UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: DEPUY ORTHOPAEDICS, INC., PINNACLE HIP IMPLANT PRODUCT LIABILITY LITIGATION	)	MDL Docket No. 3:11-MD-2244-K
	)	Honorable Ed Kinkeade
This Document Relates To: ALL CASES	)	

SETTLING PLAINTIFFS' RESPONSE AND OBJECTION TO THE AMENDED PRELIMINARY HOLDBACK ORDER

In compliance with the Court's Amended Preliminary Holdback Order (ECF Doc. 924), the undersigned law firms present this Response and Objection on behalf of plaintiffs who have entered into confidential settlement agreements with Defendants ("Settling Plaintiffs"). The Settling Plaintiffs reserve the right, with the Court's guidance and permission, to submit additional briefing and evidence at a later time. The Settling Plaintiffs recognize that the work of the Plaintiffs Executive Committee, for the common benefit of all Plaintiffs, should be rewarded; however, the proposed common benefit holdback is not in line with historical precedents for the type of work performed in similar MDLs, including in *In Re: Depuy Orthopaedics, Inc., Pinnacle Hip Implant Product Liability Litigation*. As such, for the reasons stated herein, Settling Plaintiffs' respectfully submit this response and objection to the Court's upward adjustment of the common benefit holdback percentage.[1]

[1] There has been extensive motion practice and briefing in this litigation regarding the issue of common benefit holdback. *See* Preliminary Holdback Order (ECF Doc. No. 889), Plaintiff's Executive Committee's ("PEC") Motion to Modify the Preliminary Holdback Order and for an Assessment on Settling Cases along with Supporting Brief (ECF Doc. No. 913), Defendant's Response to the PEC's Motion to Modify the Preliminary Holdback Order and for an Assessment on Settling Cases (ECF Doc. No. 915), and PEC's Reply to Defendant's Response to the PEC's Motion to Modify the Preliminary Holdback Order and for an Assessment on Settling Cases (Doc. 918). The factual and

I. Argument in Support of Settling Plaintiffs' Response and Objection to the Amended Preliminary Holdback Order

The PEC's request to dramatically increase the holdback percentage attempts to jeopardize the private agreements reached by the Settling Plaintiffs.

In light of counsel's duty to assist the Court in the arduous case administration of an MDL, the Settling Plaintiffs bring this response and opposition to the Court's Amended Holdback Order and respectfully argue that a twenty-five percent holdback is an unreasonable departure from MDL holdback precedent, in similar cases, and the increase in the holdback percentage is unfair and prejudicial to the Settling Plaintiffs.

A. The Twenty-Five Percent Holdback is an Unreasonable Departure from MDL Holdback Precedent.

First and foremost, a common benefit hold back of twenty-five percent is unprecedented and incomparable to other MDL holdback valuations. *See In re Actos (Pioglitazone) Prods. Liab. Litig.*, 274 F.Supp.3d 485 (W.D. La. 2017) (8.6% common benefit fee award was reasonable, where a full global resolution was reached in less than 4 years); *In re Visa Check/ Mastermoney Antitrust Litig.,* 297 F. Supp. 2d 503 (E.D.N.Y. 2003) (awarding 6.5% of common benefit fund); *In re Avandia Marketing Sales Practices and Prods Liab. Litig,* 2006 WL 6923367 (E.D. Pa. 2012) (6.25% award on "super-mega-fund" settlement reached in three years); *In re WorldCom, Inc. Sec. Litig.,* 388 F. Supp. 2d 319 (S.D.N.Y. 2005) (allowing 5.5% award); *In re AOL Time Warner, Inc. Sec. & ERISA Litig.,* MDL 1500, 2006 WL 3057232 (S.D.N.Y. Oct. 25, 2006) (5.9% award on $2.65 billion fund); *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907 (N.D. Ohio 2003) (4.8% award on

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procedural background has been addressed in the aforementioned motions, and thus, the Settling Plaintiffs need not recite it here.

$1.045 billion fund); *In re Gadolinium Based Contrast Agents Prods. Liab. Litig.*, 2009 WL 10703918 (N.D. Oh. Feb. 20, 2009) (establishing holdback of 6%); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 553 F.Supp.2d 442 (E.D. Pa. 2008) (noting "range of awards" in multi-billion dollar cases was 4.8% to 15%); *see also* Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 14:9 (4th ed. 2002) ("Most [MDL] courts have assessed common benefit fees at about a 4–6% level, generally 4% for a fee and 2% for costs."); Paul D. Rheingold, *Litigating Mass Tort Cases* § 7:35 (2010) ("[P]ercentages awarded for common funds in recent MDLS ... were in the 4–6% range.") (citation omitted).

Beyond the fact that typical percentages in MDLs remain in the 4-6% range, the amended preliminary holdback of twenty-five percent significantly exceeds the Common Benefit in all other major hip litigations; in fact, even the preliminary holdback of 10% in August 2018 exceeded the Common Benefit holdbacks in other major hip litigations. Examples from other major hip litigations are outlined below:

MDL #	**Court**	**Product**	**Common Benefit %**	**Common Benefit Fees and Costs**
MDL 2197	Northern District of Ohio	DePuy ASR	6 %	5% attorney fees 1% costs
MDL 2329	Northern District of Georgia	Wright Conserve	7 %	3.5% attorney fees 3.5% costs
MDL 2158	US District of New Jersey	Zimmer Durom	4 %	2% attorney fees 2% costs
MDL 2391	Northern District of Indiana	Biomet M2A	6 %	5% attorney fees 1% costs
MDL 2441	US District of Minnesota	Stryker Rejuvenate/ABGII	4 %	3% attorney fees 1% costs
MDL-2775	US District of Maryland	BHR Resurfacing	7%	5% attorney fees 2% costs

Accordingly, this Court's amended preliminary holdback of twenty-five percent is contrary to well-established law. A preliminary holdback of 25% is not reasonable on its face when the common benefit percentages of all other major hip litigations have ranged from 4-7%.

Moreover, the more accepted practice in MDL favors reducing, as opposed to increasing, preliminary holdback percentages for common fund contributions. *See In re Genetically Modified Rice Litig.*, 2010 WL 716190 (E.D. Mo. Feb. 24, 2010) (reducing hold back percentage by one percent); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 553 F.Supp.2d 442 (E.D. Pa. 2008) (awarding less than the total fund created by assessment by reducing federal assessments by 3% and state assessments by 2%). Original "conservative" holdback percentages, are more likely to be reduced, not increased.

B. The Twenty-Five Percent Holdback Is Unfair to the Settling Plaintiffs.

One of the overriding justifications behind the common benefit doctrine is the principle of equity. *In re Vioxx Prods. Liab. Litig.*, 760 F.Supp.2 640, 647 (E.D. La. 2010). Accordingly, MDL courts should evaluate the fairness to *both* counsel *and* plaintiffs in determining the appropriate assessment for common benefit costs. *See In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 2008 WL 682174, at *19 (D. Minn. Mar. 7, 2008) (emphasis added). The primary purpose of MDL consolidation is to promote efficiency and reduce costs amongst counsel, and thus, it necessarily follows that plaintiffs should also reap the same benefit of lower fees and efficiency. *See In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig.*, 2016 WL 10719395, at *2 (N.D. Tex. Jan 8, 2016) (citations omitted). Further, the Fifth Circuit has emphasized that the MDL court has the

responsibility to undertake exacting review to ensure that the award of fees and costs are reasonable and consistent with the governing law. *In re High Sulfer Content Gasoline Products Liability Litigation*, 517 F. 3d 228 (5th Cir. 2008).

As discussed *supra*, the Court's Amended Holdback Order increases the common benefit holdback by fifteen percent. Yet, the only change that has occurred in this litigation between the time of the Court's Preliminary Holdback Order and the Amended Preliminary Holdback Order is the Court's receipt of notice that Defendants and select plaintiffs' attorneys had engaged in confidential inventory settlements. Notably, since the issuance of the Preliminary Holdback Order, no case within this MDL has proceeded to trial, been argued on appeal, or decided on appeal. Thus, there has been no substantial change in costs since August of 2018. Nevertheless, the Amended Holdback Order seeks to more than double the amount of plaintiffs' costs to be held back. This increase is unfair to the Settling Plaintiffs, especially when there has been no significant change in the litigation over the past four months. *See In re San Juan Dupont Plaza Hotel Fire Litig.*, 111 F.3d 220, 233 (1st Cir. 1997) ("Thus, as the ultimate payors[,] the individual plaintiffs…have enough at stake to warrant reasonable efforts at ensuring that adequate documentation and cost-monitoring procedures also make cost-benefit sense."). In essence, the Amended Holdback Order conveys to all plaintiffs, in both current and future litigations, that settling, in and of itself, brings with it the possibility of negatively affecting the plaintiff's portion of recovery. Such precedent seeks to deter settlement and undermines the equitable intent of the common benefit doctrine.

II. Conclusion

For the reasons set forth herein, Plaintiffs respectfully respond and object to the Court's upward adjustment of the common benefit holdback percentage.

Further, the Settling Plaintiffs' adopt and incorporate arguments made by the DePuy and Johnson & Johnson Defendants, as well as other objectors in opposition to the Amended Holdback.

Dated: December 17, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2018, I electronically filed the foregoing document with the Clerk of the court using CM/ECF system which will send notification of such filing to the CM/ECF participants registered to receive service in this MDL.

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